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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1941.

No. 902

315 U.S. 813

HARRY C. BARKER,
Petitioner,

vs.

MORRIS J. LEVIN, Trustee in Bankruptcy of Harold J. Kattelman, Doing Business as H. J. Kattelman Company,
Bankrupt,
Respondent.

PETITION AND BRIEF

For Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

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SUPREME COURT OF THE UNITED STATES.

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MORRIS J. LEVIN, Trustee in Bankruptcy of Harold J. Kattelman, Doing Business as H. J. Kattelman Company,
Bankrupt,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Eighth Circuit.

To the Honorable Harlan Fiske Stone, Chief Justice, and the Honorable Associate Justices of the Supreme Court of the United States:

Your petitioner seeks a review of the judgment of the Circuit Court of Appeals for the Eighth Circuit entered on October 23, 1941, in the certain cause entitled "Morris J. Levin, Trustee in Bankruptcy of Harold J. Kattelman, doing business as H. J. Kattelman Company, a Bankrupt, appellant, vs. Harry C. Barker, appellee," numbered 12,047 (in bankruptcy) of causes in said Court. Petitioner is the appellee named in said cause.

The opinion of the Court of Appeals was written by the Honorable Archibald H. Gardner, one of the Judges of the said Court. The case has not been reported, but the opinion is set out in the printed record accompanying this petition at pages 68 to 75, and the judgment entered thereon at page 75 of said record. The motion for a rehearing was filed November 7, 1941 (R. p. 105), and overruled November 14, 1941 (R. p. 107).

The appeal was from a judgment order of Honorable George H. Moore, District Judge (in Bankruptcy) of the Eastern Division of the Eastern Judicial District of Missouri, entered on April 5, 1941, without opinion (R. p. 59), on an appeal from a judgment of the Referee in Bankruptcy entered on February 27, 1941 (R. p. 57).

Your petitioner respectfully shows:

I.

STATEMENT OF THE BASIS OF THE JURISDICTION OF THIS COURT.

The jurisdiction of this court is conferred by Section 240 (a) of the Judicial Code; 28 U. S. Code 347 (a), and by the Bankruptcy Act, Sec. 47, Title 11, U. S. Code.

The petitioner has complied with Section 8 (a) of the Act of February 13, 1925, 28 U. S. Code 350. The final judgment of the court below (R. 75) became final on November 14, 1941, when a petition for rehearing was denied (R. 107). This petition is filed within three months thereafter. (See Appendix p. 41.)

II.

A SUMMARY STATEMENT OF THE MATTER INVOLVED.

This petition presents primarily questions of jurisdiction and the manner of its exercise by courts of appeals in bankruptcy proceedings. It grows out of an opinion and judgment of the Circuit Court of Appeals for the Eighth Circuit, reversing on the facts an order of a District Judge in a bankruptcy proceeding increasing an allowance made by a referee in bankruptcy to the petitioner as the attorney for a receiver in bankruptcy, and ordering the reinstatement of the order made by the referee.

The proceedings involved were had on the application of the petitioner (R. p. 5) for compensation for services rendered a receiver in bankruptcy by appointment of the District Judge in instituting and prosecuting proceedings for the recovery of concealed assets before the same District Judge or on appeals from his orders. All told there was ultimately recovered some $58,000.00 worth of assets (R. 35), a portion of which, of the value of $31,794.67 (R. 48), was subsequently, on reclamation proceedings, ordered returned to third persons, subject to a lien for the costs of recovery. The contribution of petitioner to the recovery was one of the material issues involved.

On a hearing before the Referee in Bankruptcy he allowed the petitioner $5,000.00 (R. p. 57). The petitioner appealed (R. p. 54), and on a hearing (R. p. 58) the District Judge increased the allowance to $10,000.00 (R. p. 59) and from that judgment the trustee in bankruptcy appealed to the Circuit Court of Appeals for the Eighth Circuit (R. p. 1).

On the appeal the trustee-appellant designated (R. p. 63) and caused to be filed with the Circuit Court of Ap-

peals an authenticated record (R. p. 65), which was thereafter printed in accordance with the rules of the Eighth Circuit (R. p. "A"), and is incorporated in the record filed herewith (R. pp. 1 to 66).

The authenticated record did not contain the order of reference or its substance, nor any findings of fact by the Referee or by the District Judge, other than the ultimate finding as to the value of services. Neither did it contain any bill of evidence or other statement of the oral proceedings had at the hearing before the District Judge.

The record did show that the trustee-appellant was authorized by an order of the Referee in Bankruptcy to prosecute the appeal to the Court of Appeals at the cost and expense of the bankrupt estate (R. p. 63). It disclosed also that by other orders theretofore made by way of allowance of compensation and administrative expenses to other persons, and not appealed from, that all the assets of the bankrupt estate had been exhausted (R. pp. 56-61), and that the result of the appeal could neither enhance nor diminish the bankrupt estate, and that the only persons who could be affected by the result of the appeal were the third parties who had theretofore secured reclamation orders repossessing securities of the value of $31,794.69 theretofore recovered in the bankruptcy proceedings, subject to a lien for the reasonable cost of the recovery to be fixed on a contemplated proceeding for the assessment of such lien (R. p. 61). Based on these record facts the petitioner moved to dismiss the appeal, contending that the trustee, in his official capacity, was not aggrieved by the judgment of the District Judge and that the appeal by him, as sole appellant, conferred no jurisdiction on the Court of Appeals to review the judgment on the facts (R. p. 66). The Court of Appeals denied the motion to dismiss and ruled that because the judgment order recited that the

petitioner "have and recover of the bankrupt estate" the sum awarded him the Trustee in Bankruptcy was an aggrieved party (Opinion, R. p. 71).

The Referee's transcript, included in the record on appeal, showed that the District Judge had and was authorized to take into consideration his personal knowledge, both as to the extent and as to the value of the services, because said services had been rendered in proceedings largely had before him (R. p. 25), but did not contain any findings of fact by the District Judge or bill of evidence or other statement of the proceedings had before him on the appeal from the order of the Referee, nor any certificate that he had tried the cause solely on the record made before the Referee, nor any request by the trustee-appellant for findings, or any objection by him to any failure of the District Judge to make findings, and no such documents were designated for inclusion in the record on appeal (R. p. 63). The Court of Appeals undertook to review the judgment on the merits on the facts. The question of the sufficiency of the record to authorize such review by the Circuit Court of Appeals under the Bankruptcy Act and the Rules of Civil Procedure applicable thereto is presented herein.

In reviewing the case on the merits on the facts, the Court determined the results achieved by petitioner and in the absence of facts and evidence in the record which it obviously deemed necessary to its conclusion and judgment, the Court of Appeals, from some source not disclosed by the opinion, and in violation of its own rules (13-14), assumed and incorporated in its opinion purported facts dehors the record, among other things that all petitioner's services were rendered after adjudication (R. p. 69); that there was on hand when he undertook his employment $16,000.00 in unconcealed assets (R. p. 74) and

unconcealed real estate from which rents aggregating $9,800.00 were collected without effort on petitioner's part (R. p. 74); that the Referee made proper findings of fact (R. pp. 70-72); that the District Court heard no evidence and reviewed the cause solely on the record made before the Referee and entered no findings (R. pp. 71-72), and, with such assumed facts as the basis for a mathematical computation, demonstrated in the opinion (R. p. 74), concluded that the petitioner had recovered or contributed to the recovery of concealed assets of a value not exceeding $8,700.00, as against the contention of the petitioner that he had recovered or been the effective cause of the recovery of approximately $58,000.00 in assets (R. pp. 35, 39, 41). On its conclusion that petitioner had recovered only $8,700.00 worth of assets, the Court of Appeals concluded that the judgment of the District Judge was excessive, and so, concluding, reversed it and reinstated the order of the Referee (R. p. 75). The question is presented as to the jurisdiction of an appellate court to decide a cause on facts dehors the record and in violation of its rules, and whether by so doing it so far departed from the usual and accepted course of judicial procedure as to call for the exercise of this Court's power of supervision.

The record on the appeal did not contain the order of reference or its substance. The Court of Appeals obviously assumed, however, that it was not restricted and authorized the Referee to report his conclusions on the law and on the facts, and on that assumption ruled that the District Judge was bound to approve such findings unless clearly erroneous, as provided by the General Orders in Bankruptcy, Sec. 47, applicable only to references which are unrestricted, and so assuming made the further assumption, contrary to the record, that the Referee did make full findings of fact.

The question is presented as to the weight an appellate

court may give to a conclusion of fact by a referee in the absence of a record showing the terms of the reference.

While the Referee made no findings of fact, other than the ultimate finding of the value of the services, he did report one conclusion of law on which he based his ultimate conclusion (R. p. 58), to the effect that having on the same day, in other proceedings, made awards for administrative expenses, exceeding all the remaining assets of the bankrupt estate and requiring an assessment against the assets theretofore reclaimed by third persons, he must take such fact in consideration as bearing on the reasonable value of petitioner's services, the effect of which conclusion of law was to reduce petitioner's award, in anticipation of a hearing at which all parties in interest were represented to marshal and apportion available assets in view of a deficiency of assets, to pay all awards in full, and in an endeavor to avoid the necessity of such a proceeding to fit the award to plaintiff to the anticipated available fund, without regard to priority and without any showing that a corresponding deduction had been made in the awards to any of the other parties; the record did show affirmatively (R. p. 52) that no such deduction had been made in the award to the Receiver or in the award to the trustee, since each of them were allowed the maximum compensation allowed by law on a gross fund in excess of $58,000.00, which included the total assets at any time recovered for the estate, plus the entire value of the assets reclaimed by third persons.

The propriety of the said rule of law, and its effect on the judgment of the Court of Appeals, based upon the adoption of the Referee's conclusion of fact based thereon, is presented.

Petitioner's motion for rehearing (R. p. 77) was filed in due time (R. p. 105). In it the Court's attention was

directed to the state of the record on appeal and to the fact that its conclusions had been based upon facts dehors the record, in violation of its rules and in violation of petitioner's constitutional rights to due process of law. The motion was denied without opinion (R. p. 107).

The several questions herein presented are designed to present in various aspects the fundamental questions involved.

III.

QUESTIONS PRESENTED.

1.

(Relating to jurisdiction of Court of Appeals as affected by the status of appellant as an aggrieved party.)

(a) Whether or not the Circuit Court of Appeals became vested with jurisdiction, on appeal, to review on the merits on the facts the judgment order involved, made in a proceeding in bankruptcy, which fixed the compensation of an attorney for a receiver in bankruptcy, the appeal being prosecuted by the trustee in bankruptcy in his official capacity as the sole appellant, when it appears from the record, and is conceded by the trustee-appellant, that the facts and circumstances were such that the bankrupt estate could in no event be either enhanced or diminished or otherwise beneficially or detrimentally affected by the result of the appeal?

(b) If the facts assumed in subsection (a) of this question 1 be deemed generally insufficient to vest the Circuit Court of Appeals with jurisdiction at the suit of the trustee-appellant, would such jurisdiction vest if it further appeared from the record that the judgment involved might have the effect of increasing the amount which might be assessed against cash and securities theretofore

Question 1 (continued)

recovered of the bankrupt and subsequently reclaimed by third persons, subject to a lien for the reasonable costs of recovery in an amount not yet determined, and that a part of said reclamation parties, or their attorneys, representing, in value, 72 per cent of said reclaimed property, deeming themselves aggrieved by said judgment, had requested the trustee in bankruptcy to appeal the same, in his official capacity, however, and at the cost and expense of the bankrupt estate, and that on said showing the Referee in Bankruptcy had authorized the trustee to appeal in his official capacity and to pay the costs and expenses thereof from the assets of the bankrupt estate, it appearing further the said assets were insufficient to satisfy in full the unappealed awards of compensation to administrative officers theretofore made, exclusive of any award to the petitioner?

(c) If it be found generally that under the circumstances set out in subsections (a) and (b) of this question 1 the Circuit Court of Appeals would not have been vested with jurisdiction to adjudge the cause on the merits on the facts, at the suit of the trustee-appellant, would the further and additional fact that the judgment order from which the appeal was prosecuted recited that the petitioner "have and recover the sum awarded him of the bankrupt estate" constitute the bankrupt estate the aggrieved party and vest the Circuit Court of Appeals with jurisdiction to review said judgment on the merits on the facts at the sole suit of the trustee-appellant in his official capacity?

2.

(Relating to the insufficiency of the record to vest the Court of Appeals with jurisdiction and to the jurisdiction of the Court to adjudge the cause on facts dehors the record in violation of the Fifth Amendment.)

Question 2 (continued)

Whether or not the Circuit Court of Appeals proceeded without jurisdiction or in excess of jurisdiction in reviewing on the merits on the facts the judgment order of the District Judge, entered in a proceeding in bankruptcy on a hearing and review of an order of the Referee in Bankruptcy, fixing the compensation of the petitioner as attorney for a receiver in bankruptcy; or proceeded in a manner in conflict with the applicable provisions of the Bankrupty Law, including the provisions of the Rules of Civil Procedure made applicable thereto by the General Orders in Bankruptcy, or sanctioned a procedure in conflict therewith by a lower court, or so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court as to deprive the petitioner of rights guaranteed by the Constitution (Fifth Amendment), and in such manner as to call for the exercise of this Court's power of supervision, in the circumstances set forth in one or more of the subdivisions of this question that follow:

(a) Where it appeared from the certified record that the services for which compensation was adjudged had been rendered under appointment by and in proceedings conducted chiefly before the District Judge, whose judgment was being reviewed, and under circumstances wherein the District Judge had and was authorized to take into consideration, in fixing said compensation, his personal knowledge both as to the extent and value of such services, the certified record on appeal, however, not containing (1) any findings of fact by the District Judge other than the ultimate conclusion implied in the judgment, (2) any opinion by him, (3) any bill of evidence or transcript, stenographic or otherwise, or any agreed statement of facts presented on the hearing had before said District Judge on said appeal from the order of the Referee, or any certificate that he had tried the cause solely on the record

Question 2 (continued)

of the proceedings had before the Referee, (4) anything, other than the implications from the amount of the judgment, from which it could be determined that facts or circumstances within the personal knowledge of the District Judge had been considered by him, or the weight and effect which he gave to such facts or circumstances; (5) anything showing that the appellant had made any application to the District Judge to make and file findings of fact or that the appellant had objected to any failure of the Court to make findings; the only evidential facts or circumstances presented to the Court of Appeals, by the certified record, being such as were contained in the Referee's transcript of the testimony of witnesses heard by him, from which it appeared the District Judge did not testify before the Referee, and, it further appearing, from the said transcript, that in making his order fixing petitioner's compensation the Referee took into consideration matters within his personal knowledge, which matters were not identified and not preserved in the record in any statement, opinion, findings of fact, or otherwise, and that on the hearing before the Referee exhibits material to the issue were received in evidence and material documents on file in the principal bankruptcy proceedings were put in evidence by reference, none of which were incorporated in the Referee's transcript, nor were their contents, substance or legal effect stated therein, or in the certified record in the Court of Appeals?

(b) Under the circumstances stated in subsection (a) of this question 2, has the Circuit Court of Appeals, by reviewing the cause on the record of the proceedings before the Referee without any record of the proceedings before the District Judge, in legal effect reviewed only the order of the Referee, without reviewing or being able to review the superseding, intervening judgment of the District Judge, from which the appeal was prosecuted, and has it,

Question 2 (continued)

by so doing, in legal effect entertained an appeal direct from a referee, and thereby assumed to exercise a jurisdiction not conferred upon courts of appeals generally by the Bankruptcy Law, and if it might review the judgment appealed from on a proper record of the proceedings before the Referee, has it exceeded its jurisdiction by reviewing the same on the merits on the facts, in the circumstance that the record of the proceedings before the Referee was on its face defective and incomplete in that it did not disclose all the material evidence and facts considered by the Referee or any findings of fact by him on the evidence, other than the amount of the award?

(c) Whether or not the Court of Appeals acted in excess of its jurisdiction, or in disregard of fundamental rules of judicial procedure, or in abuse of its judicial discretion or prerogatives under the circumstances that, in reviewing on the merits on the facts the judgment therein involved, the Court of Appeals considered as established, and adopted and incorporated in its opinion as premises for its ultimate conclusion purported and unauthenticated facts dehors the record, the purported facts so assumed not being facts found by a lower court, nor facts conceded by the petitioner, nor facts which might be judicially noticed by a court, the said purported facts appearing in the first instance in the opinion delivered by the Court of Appeals without the petitioner having been afforded any hearing or opportunity to be heard as to the truth thereof.

(d) Whether or not, under the circumstances stated in subsections (a), (b) and (c) of this question 2, the Circuit Court of Appeals tried, determined and adjudged on the merits on the facts a cause other than the cause presented to it on the record, and other than the cause to which its jurisdiction, if any, attached by the appeal, and other than the cause tried by the parties and heard by the

Question 2 (continued)

lower court, contrary to the laws creating it as a court of appeals, and contrary to the provisions of the Uniform Bankruptcy Law, and thereby deprived petitioner of his property without due process of law, contrary to the provisions of the Fifth Amendment to the Constitution of the United States.

(e) Whether or not the Circuit Court of Appeals, under the circumstances stated in subdivisions (a), (b) and (c) of this question 2, and particularly in view of the duly established rules of said court providing for the designation of the contents of and the presentation of printed records on appeal, providing in substance that the Court would consider only the record as thus printed, and that if at the hearing it appeared that any material part of the record had not been printed, that the Court might make such order (including dismissal of the appeal) as may seem proper (Rule 13), and that the Court would disregard any statement in the argument (brief) unless reference was made to the page of the printed record where the statement could be found or verified, by reviewing and adjudging the cause on unauthenticated facts dehors the record, violated, to petitioner's prejudice, such rules, and deprived petitioner of due process of law, contrary to the Fifth Amendment of the Constitution of the United States?

3.

Whether or not the Court of Appeals, by approving and reinstating the order of the Referee, adopted and applied a rule of law in conflict with the Uniform Bankruptcy Law, it appearing from the record that the Referee, having, in other proceedings, made allowances to other persons for administrative expenses exceeding in amount the assets of the bankrupt estate, and requiring an assessment, not yet had, against assets theretofore awarded certain reclamation parties, concluded that in determining in the first

Question 3 (continued)

instance the reasonable value of petitioner's services he must take into consideration such facts; the effect of the application of said rule of law being to restrict the amount of the award to petitioner to such sum as would permit the payment in full of all such other allowances from the contemplated available fund, it not appearing from the record that a like rule of law had been applied in making any of the other allowances, and it affirmatively appearing from the record that a like rule of law had not been applied in making the allowances to the Receiver or to the appellant, for his services as trustee, the record showing that each was awarded the maximum compensation allowable by the Bankruptcy Law, when calculated upon the maximum value of all the assets, including the assets theretofore recovered from the trustee by third persons in reclamation proceedings, aggregating all told a gross fund slightly in excess of $58,000.00; it further appearing that the application of said erroneous rule of law may and probably did presently cast upon the petitioner the whole burden resulting from the contemplated deficiency of assets, and, in the event the contemplated fund should not be realized in full, or in the event of a miscalculation as to the funds ultimately available for payment resulting in an ultimate deficiency of funds available to pay all awards in full, would, on a proceeding to marshal and apportion assets actually available among all the parties holding awards, in accordance with their respective priorities as fixed by the Bankruptcy Law, necessarily subject petitioner's award to a second and further abatement. It further appearing that the application of said erroneous rule of law was that the Referee determined (and the Court of Appeals approved such determination), that petitioner was not entitled to the priority afforded his demand by the Uniform Bankruptcy Law, as the same was in force at the time when the said services were undertaken

Question 3 (continued)

and concluded, and also that petitioner's claim under the provisions of the Chandler Act in force at the time of the award was not entitled to any priority over the several allowances made by the Referee in other proceedings, or as against the assets recovered for third persons, all without a hearing and in a proceeding wherein the question of priority was not involved, due to the fact that a deficiency of assets to pay all awards in full was only contemplated and had not been legally established and could not, in any event, have been legally determined in the particular proceeding for lack of necessary parties.

4.

Whether or not the Circuit Court of Appeals, in deciding an appeal on the merits on the facts, might give any weight to the conclusions of a referee, the order of reference, if any, not being incorporated in the record, nor its substance stated or conceded, and said conclusions not having been approved by the District Court.

IV.

REASONS FOR GRANTING THE WRIT.

The petitioner relies generally for the issuance of the writ upon the importance to the public of restricting courts generally to the jurisdiction conferred upon them by law; the importance of a uniform construction and application of the Bankruptcy Law, and of an authoritative interpretation and application of the new Rules of Civil Procedure and applicable statutes, with particular reference to the necessity of findings of fact by the lower court and the necessity of a settled bill of evidence or record of the proceedings in the lower court as a condition precedent to a review on the facts in the appellate court; the importance of preserving to the public generally the prohibitions and

guaranties of the Fifth Amendment against arbitrary judicial action, free from the disintegrating influences of violations thereof in particular cases, and particularly of restricting Circuit Courts of Appeal from arbitrarily deciding cases squarely upon purported facts de hors the record without affording, and, under their constitution as courts of purely appellate jurisdiction, without being able to afford, a party adversely affected thereby, a hearing thereon, and upon conflict of decisions of the several circuits.

Question 1 and Its Subdivisions.

THE APPELLANT WAS NOT AGGRIEVED.

On the record presented to the Court of Appeals it appeared that the trustee-appellant was not and could not be either adversely or beneficially affected by the judgment and was not aggrieved. That he did not appeal to redress a purported grievance against the estate, but that, with the consent of the Referee, he was lending the prerogatives of his office to undisclosed third persons who claimed to be aggrieved, but who represented only 72 per cent of the assets theretofore reclaimed of the trustee subject to a lien for the reasonable costs of recovery not yet assessed. It was conceded that the only persons who could be affected by the result of the appeal were the certain reclamation parties collectively (R. p. 62), none of whom participated in the appeal or were identified of record in such manner as to be estopped by the appeal or assessed with the costs and damages which might result therefrom.

It is fundamental that only parties substantially aggrieved may by appeal vest the Court of Appeals with jurisdiction of a cause on the merits. Section 48, Title 11, U. S. C., contemplates such limitation on the right to appeal and expressly provides that the appeal shall be taken "within thirty days after written notice to the aggrieved party" (Appendix, p. 42).

It is submitted that it would be against the public interest to open the doors of courts to mere volunteers, lacking any substantial interest in the subject matter of the litigation, and that the ruling of the Court of Appeals in effect accomplishes that result.

The precise facts have not, we believe, been heretofore submitted to this Court for decision, but the conclusion of the Court of Appeals conflicts with the statute above cited and with fundamental principles of law and in principle conflicts with the following decisions of this Court, declaring that courts may not determine issues at the suit of a party who has no interest that will be substantially affected by the result of the suit:

McCandless v. Pratt, Commissioner, etc., 211 U. S. 437-442, 53 L. Ed. 271;
Carrie B. Smith etc. v. State of Indiana ex rel. Martha and Benjamin Lewis, 191 U. S. 138, 149, 48 L. Ed. 125.

The decision conflicts in law with the ruling of the Ninth Circuit.

King v. Buttolph, 30 Fed. (2) 769;
Hamilton Trust Co. v. Cornucopia Mines Co., 223 Fed. 494.

Question 2, Subdivision (a).

THE RECORD DID NOT AUTHORIZE A REVIEW ON THE FACTS.

The question presents primarily the necessity of a proper record as a prerequisite to a review on the facts by a Court of Appeals.

The ruling of the Court of Appeals that it might review the judgment involved on the facts, on a record which did not contain any findings of fact by the lower court, or adoption of facts found by a referee, and indeed no order of reference authorizing the referee to determine and report

his conclusions of fact, and which did not contain any transcript or certificate of the evidence heard and considered by the lower court or any certificate that the cause was heard and submitted to the lower court on the evidence taken before the Referee, simply circumvented the jurisdiction of the District Court on which the jurisdiction of the Court of Appeals depended, and established, in lieu of the uniform procedure established by law a special procedure whereby the Court of Appeals reviewed directly the proceedings of the Referee. The procedure was in conflict with the Bankruptcy Law, the Rules of Civil Procedure reasonably interpreted, and with the fundamental principles of appellate jurisdiction and procedure, particularly in view of the fact that the lower court, whose judgment was the subject matter of the appeal, was authorized, in determining the issues, to take into consideration his personal knowledge as to the character and extent of the services for which compensation was claimed, derived from presiding over the litigation wherein such services were rendered, in addition to his expert knowledge as to the value of legal services generally. His personal knowledge not being shared by the appellate court or by the Referee and not being available to the appellate court in the absence of a record or of special findings.

The ruling was arbitrary and conflicts with the fundamental principles of judicial procedure and with the provisions of the Rules of Civil Procedure [Rules 46-52 (a) (b)] (Appendix, pp. 43-44) made applicable to the appeal by General Order in Bankruptcy (Nos. 36-37) (Appendix, pp. 42-43), and conflicts with the prior and well-considered series of decisions of the same circuit on the same subject:

(8th) Storley v. Armour & Co., 107 Fed. (2) 499-513;
(8th) Helvering v. Johnson, 104 Fed. (2) 140-144;
(8th) Gerlach v. Chicago, R. I. & P. Ry. Co., 65 Fed. (2) 862;

(8th) Edwards v. Holland Banking Co., 75 Fed. (2) 713;
(8th) Humphrey v. Hilgerson, 78 Fed. (2) 484;
(8th) Roosevelt v. Mo. State L. Ins. Co., 70 Fed. (2) 939-945.

The last four cases being under old Equity Rule 70½.

By arbitrarily applying a different rule in the instant case, without notice, the Court has in effect trapped the petitioner and applied to him retroactively a rule, different from its established rule, and arbitrarily deprived him of an opportunity to have settled and filed in the lower court a proper bill of evidence, if the burden was in fact on him to do so, and to present such record to the appellate court.

The decision conflicts with the following series of decisions of the Sixth Circuit holding that absent findings of fact by the lower court it cannot review the facts:

(6th) Drybrough v. Ware, 111 Fed. (2) 548-550;
(6th) Hill v. Ohio Casualty Co., 104 Fed. (2) 695;
(6th) Detroit Trust Co. v. Union Guardian Trust Co., 65 Fed. (2) 73;
(6th) Hyman v. Meifert, 57 Fed. (2) 861;
(6th) Welsh Bibout & Hill v. Willis, Trustee in Bankruptcy, 89 Fed. (2) 1009.

Conflicts in principle with the following decisions of this Court declining to review the facts absent findings by the lower court:

United States v. Pyne, 313 U. S. 127-130, 85 L. Ed. 1231;
Mayo v. Lakeland Highlands Can Co., 309 U. S. 310-316, 84 L. Ed. 774;
Interstate Circuit, Inc., v. U. S. of America, 304 U. S. 55-58, 82 L. Ed. 1146;
Railroad Comm. v. Maxcy, 281 U. S. 82, 74 L. Ed. 717;
Fleischmann Const. Co. v. U. S., 270 U. S. 349-355, 70 L. Ed. 625;

and in principle conflicts with the following decisions of this Court denying the power of an appellate court to review a cause on an incomplete record:

Meeker v. Lehigh Valley R. Co., 236 U. S. 412-431, 59 L. Ed. 645-658;

Mitchel et al. v. United States, 9 Peters 711-729, 9 L. Ed. 283-291.

And of the several circuits in that respect:

(C. C. A., 2 Cir.) Grossman v. Kridel, 90 Fed. (2) 624;

(5th) Ryals v. United States, 69 Fed. (2) 946.

It is submitted that the importance of an early and authoritative construction of the new Rules of Civil Procedure and of the Bankruptcy Act in a manner consistent with their declared purpose of uniformity is of such importance as to call for the intervention of this Court to prevent rulings inconsistent therewith in the first instance and particularly that the jurisdiction of this Court should be exercised when it is considered that the ruling in this case is in conflict with the decisions of other Circuit Courts of Appeals as stated, and in effect denied petitioner due and equal process of law.

Question 2, Subdivision (b).

Question 2 (b) submits the question of law arising from the facts submitted under 2 (a) in a different aspect: Whether or not, by undertaking to review the judgment involved in the appeal solely on the record of the proceedings had before the Referee, and without any findings of fact by the District Court, it has in effect circumvented the intervening jurisdiction of the District Judge and entertained an appeal directly from the Referee and exercised a jurisdiction on appeal not conferred upon it by law.

The subquestion is believed to present and to be gov-

erned by the same consideration of public policy as is assigned to the preceding subdivision.

Question 2, Subdivisions (c), (d) and (e).

THE COURT RULED THE CASE ON UNAUTHENTICATED FACTS DEHORS THE RECORD.

It is submitted that a mere statement of the facts on which question 2, subdivision (c), and alternative subdivisions (d) and (e) are based, impel the intervention of this Court.

The Court of Appeals simply determined that the judgment was excessive, and reversed it on purported facts which had their genesis in the opinion without the formality of a hearing as to the verity of such purported facts.

Probably the most important issue in the case was the amount and value of concealed assets ultimately recovered of the bankrupt and the petitioner's contribution to such recovery. Due to the insufficiency of the record on appeal, that issue could not be and was not determined from the record, whether the appeal was determinable on the proceedings had before the Judge or those had before the Referee. There was no record whatever of the proceedings had before the District Judge or of the evidence on which he decided the case, and the transcript of the evidence certified to the District Court by the Referee was on its face incomplete, and omitted to state in substance or effect the contents of documents on file and referred to and considered by the Referee and omitted to state the contents of briefs and records considered or prepared by the petitioner as a part of the services for which compensation was claimed, and received in evidence by the Referee (R. 47).

In the absence of record facts necessary to a review on

the facts, the Court of Appeals simply ruled that the judgment was excessive on purported facts which did not appear in the record, and facts as to which the petitioner had not been heard or been afforded an opportunity to be heard, and which the Court of Appeals, as a court of purely appellate jurisdiction, was without jurisdiction to hear and determine in the first instance in any case.

The Court of Appeals, having concluded that as an element of petitioner's recovery it must take into consideration the value of the assets recovered by him or to the recovery of which his employment had contributed, resolved that issue by concluding from facts dehors the record that the petitioner had recovered or contributed to the recovery of only $8,700.00 worth of assets (R. 74), as against the contention of the petitioner, supported by the only testimony in the case, that he had recovered or been the effective cause of the recovery of approximately $58,000.00 in assets (R. 35). The said purported facts were not conceded by the petitioner; they were not found by any lower court and they were not facts which a court might judicially notice, and they appeared for the first time in the opinion cited by the Court of Appeals.

The facts assumed by the Court of Appeals dehors the record are set out in the summary statement of the case and in substance are as follows:

(1) The Judge made no findings and the Referee made complete findings (Opinion, R. pp. 7-72); (2) all petitioner's services were rendered after adjudication (Opinion, R. p. 69); (3) the District Court heard no evidence and reviewed the cause solely on the record made before the Referee and entered no findings (Opinion, pp. 71-72); (4) there was on hand, when the petitioner undertook his employment, $16,000.00 in unconcealed assets (Opinion, R. 74); (5) the bankrupt had unconcealed real estate from which

rents aggregating $9,800.00 were collected without effort on petitioner's part (Opinion, R. 74).

The purported facts as enumerated are simply not in the record nor inferable from anything therein. The Court having concluded from the purported facts that the petitioner had recovered or assisted in recovering only $8,700.00 in assets, then concluded, contrary to the record, that petitioner's services consisted chiefly in securing a turnover order (Record p. 70). Although that order was secured on November 23, 1935 (Record p. 13), and it was only the first step in the contempt proceedings that were carried on until March, 1937 (Record p. 17), in every court to which the bankrupt could appeal, including this Court (R. p. 25), during which time bankrupt from time to time relinquished securities (R. 26-28). And, finally, the Court concluded, contrary to the only testimony in the record, that petitioner did not contribute to the recovery of other assets of the value of $23,500.00 (Opinion, R. p. 74), although the Court stated they were described in the turnover order secured by the petitioner (Opinion, R. 74), on November 23, 1935, and on all of these assumptions concluded that petitioner was entitled to credit for recovering only $8,700.00 in assets, and in view thereof that the order of the District Court was excessive and reversed it and reinstated the order of the Referee (R. 75).

The petitioner submits that the Court of Appeals, in assuming to try the case on facts de hors the record, not heard or determined by the lower court, exceeded its jurisdiction, violated its own rules (13-14) and deprived the petitioner of his constitutional right to a hearing on the facts, in violation of the Fifth Amendment to the Constitution. That such procedure was in conflict with the fundamental principles of American and English jurisprudence.

It is submitted that the facts justify the intervention of this Court on the authority of the following cases:

Lettulle v. Scofield, 308 U. S. 415, 84 L. Ed. 355;
Mitchel et al. v. United States, 9 Peters 711-731, 9 L. Ed. 283-290;
Morgan v. U. S., 304 U. S. 1-23, 82 L. Ed. 1129-1135;
Riverside & Dan River Cotton Mills v. Williamson Menefee, 237 U. S. 189-193, 59 L. Ed. 910-912;
Rio Grande Irrigation & Col. Co. v. Gildersleeve, 174 U. S. 603-608, 43 L. Ed. 1103;
Maryland Casualty Co. v. Jones, 279 U. S. 792-796, 73 L. Ed. 960.

And in assuming to try the cause on facts de hors the record it proceeded in a manner in conflict with the decisions of the several circuits:

(9th) American Trust Co. v. Harris, 88 Fed. (2) 541;
(C. A., D. C.) Cave v. District of Columbia, 90 Fed. (2) 383;
(C. A., D. C.) Pilger v. Sutherland, 57 Fed. (2) 604;
(5th) Ryals v. United States, 69 Fed. (2) 946.

Question 3.

The question presents error of law by the Referee in determining the reasonable value of petitioner's services, in that he concluded the value of such services were, in the first instance, affected by orders allowing compensation to other persons in proceedings to which the petitioner was not a party, and in effect reduced petitioner's compensation without a corresponding reduction in the demands of persons. Fundamentally it was an evasion of established procedure, and of 11 U. S. Code, Sec. 104, in force when the demand accrued (see Appendix, p. 45), giving priority to petitioner's demand over the general costs of administration.

Question 4.

Presents for consideration the regularity of the ruling by the Court of Appeals that it might give weight to the ultimate conclusions of law and fact found by a referee, even though it did not appear from the record that the referee was authorized by the reference to report his conclusions of law and fact (General Orders in Bankruptcy No. 47, see Appendix, p. 43) and in a case in which the lower court had not adopted or approved the findings of the Referee.

V.

PRAYER FOR WRIT.

For the reasons cited, and in view of the important questions of law involved, and the public interest, it is especially submitted that the writ should issue, and that, in the discretion of the Court, it should undertake to review and determine such issues of law and fact as may be determinative of the issues on the original appeal.

Respectfully submitted,

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GEORGE O. DURHAM,

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BRIEF AND ARGUMENT.

ASSIGNMENT OF ERRORS.

I.

On the face of the record the trustee-appellant was not aggrieved by the judgment, and the Court of Appeals erred in assuming jurisdiction to determine the cause on the facts on his sole appeal.

II.

The record was insufficient to authorize a review on the merits on the facts.

III.

The Court of Appeals erred in determining the cause on the merits on the facts on purported facts appearing for the first time in the opinion of the Court of Appeals and not appearing in the record, and on facts as to which the petitioner had not been heard or afforded an opportunity to be heard, thereby depriving the petitioner of the benefits of the prohibitions and guaranties of the Fifth Amendment to the Constitution.

IV.

The Court of Appeals erred in undertaking to hear and determine the cause on a record made before the Referee to the exclusion of the proceedings had before the District Judge, which it was not able to consider for lack of a record. By so doing it in legal effect entertained an appeal directly from the Referee to the exclusion of the intervening and superseding proceedings had before the District Judge, circumventing entirely the proceedings and jurisdiction of the District Judge, on whose jurisdiction the jurisdiction of the Court of Appeals depended.

V.

The Court of Appeals erred in adopting the erroneous conclusion of the Referee that in fixing the reasonable value of the petitioner's services he must take into consideration the fact that he had made allowances to other parties in proceedings to which the petitioner was not a party.

VI.

The Court erred in considering or giving weight to the judgment order of the Referee, the order of reference not appearing in the record and it not appearing that the reference directed the Referee to report his findings and conclusions of law.

SUMMARY OF ARGUMENT.

1. The petitioner will argue with respect to question 1 and its subdivisions that the Court of Appeals acquires no jurisdiction at the sole suit of a party not aggrieved by the judgment. That the necessity of appealable interest is a matter of substance and fundamental and cannot be waived by the Court.

2. On question 2, subdivisions (a) and (b), the petitioner will argue that the jurisdiction of the Court of Appeals was limited to a review of the proceedings had in the District Court, and that without either a record of such proceedings or any findings of fact it could not undertake to review on the merits the judgment order involved. That in attempting to review the same on the record of the Referee the Court of Appeals exercised a jurisdiction which was not conferred upon it by law.

3. On question 2, subdivision (c), the petitioner will argue that the act of the Court of Appeals in reviewing

the judgment involved on purported facts de hors the record was in conflict with inherent and fundamental principles of American and English jurisprudence and deprived the petitioner of the benefits of the prohibitions and guaranties of the Fifth Amendment.

4. The petitioner will argue that the Court of Appeals in the instant case adopted a procedure in conflict with the uniform procedure prescribed by the Bankruptcy Act and the Rules of Civil Procedure, and in lieu thereof adopted a course of procedure which circumvented the jurisdiction of the District Court and deprived the petitioner of the benefits of his judgment by an arbitrary course of procedure in conflict with the usual and accepted course of judicial procedure and without a hearing, contrary to the Fifth Amendment.

5. That the rule applied to the measure of petitioner's compensation was erroneous, and calculated to abate petitioner's demand to the end of preferring other demands junior in priority.

ARGUMENT.

We submit that the procedure followed in the Court of Appeals was in conflict with the usual and accepted course of judicial procedure and the provisions of the Bankruptcy Act and the Rules of Civil Procedure, and in conflict with the prohibitions and the guaranties of the Fifth Amendment. That it amounted to no more than an arbitrary exercise of the will of the Court of Appeals, inconsistent with fundamental principles of judicial procedure.

I.

Question 1 and Its Subdivisions.

It is fundamental that appeals may not be prosecuted by volunteers. Section 48, Title 11, U. S. Code (Appendix, p. 42), recognizes that fact when it provides a limitation of thirty days for appeal after notice to the aggrieved party.

The trustee-appellant did not claim the estate was aggrieved. He applied for and was granted leave to appeal on the ground that the general assets were exhausted, and that the sole effect of the judgment would be to increase from 13 per cent to 29 per cent the assessment against the assets of third party claimants (R. 61). It is demonstrable that 29 per cent of $31,794.69, the value of the reclaimed assets (R. 48), is $9,016.46, or $1,516.46 more than the net balance of $7,500.00 (R. 59) allowed petitioner by the District Judge. The trustee represented further that he had been requested to appeal by undisclosed persons representing 72 per cent of the value of the reclaimed assets, at the cost, however, of the bankrupt estate (R. 69).

If the judgment on the appeal does not estop the third parties it is a vain appeal. If the trustee did not stand in a representative capacity to the third parties they cannot be estopped thereby.

It would appear self-evident that he did not represent, but was adverse to, the third parties in his official capacity.

When the time comes to assess the lien against the reclaimed assets, the trustee will be aligned on one side and the reclamation parties on the other. The most controlling issue will be the equitable benefits conferred on the third parties by the recapture of their securities. The major issue in that connection will be the value of the petitioner's services as a whole and what part thereof shall be assessed against the third parties. When that issue is presented will the trustee be allowed to urge that the third parties are estopped by the result of an appeal which he voluntarily prosecuted on their behalf at the request of a part of them? To ask the question is to answer it. Benevolent intentions cannot substitute for legal authority.

We are not making the record; we are taking it as we find it. The trustee-appellant sought and was granted authority to appeal solely on the theory that the only persons who might be affected by the result of the appeal were the reclamation parties, and that he had been requested to take the appeal by 72 per cent of them, at the cost of the estate, however, and, of course, without bond, and without disclosing the names of the parties requesting him to appeal.

Just what weight may a party give to an admission by an opposing party? If the admission may be disregarded by an appellate court, how may the issues be formulated on appeal?

Under the circumstances it is urged that the trustee-appellant was, on his formal admission, without appealable interest, and that the Court of Appeals acquired no jurisdiction to adjudge the cause on the facts.

The question of appealable interest is a question of fact

confronting the Court at the threshold of every appeal. It cannot be determined arbitrarily, but must be determined on the record. If it is clear from the record that the appellant is without appealable interest, then the assumption of jurisdiction would extend the jurisdiction of the Court and open the door to a multitude of vain proceedings destructive to the public interest.

The precise facts have not, we believe, been submitted to a court and determined in any other case. It is submitted, however, that the assumption of jurisdiction by the Court in the instant case conflicts with the fundamental principles of law and with Sections 47-48 of Title 11 of the U. S. Code, as amended, restricting appeals to parties aggrieved by the judgment, and probably conflicts with the principles announced in the following decisions of this Court:

McCandless v. Pratt, Commissioner, etc., 211 U. S. 437-442, 53 L. Ed. 271;

Carrie B. Smith etc. v. State of Indiana ex rel. Martha and Benjamin Lewis, 191 U. S. 138-149, 48 L. Ed. 125.

The Ninth Circuit, in the case of King v. Buttolph, 30 Fed. (2) 769, ruled that it is fundamental that an appellant must either have or represent an interest in the subject matter of the appeal.

The same Court, in the case of Hamilton Trust Company v. Cornucopia Mines Co. of Oregon et al., 223 Fed. 494, ruled that the interest of a party seeking to appeal must be subsisting, and that the right or title which such appellant seeks to establish must be his own and not that of a third person.

We do not consider that question 1 presents the most important question in the case, although we do believe that any decision extending the scope of a trustee's representa-

tive authority will result in a lack of uniformity in bankruptcy proceedings inconsistent with the very basis of the exclusive control given Congress over bankruptcy proceedings by the Constitution.

Question 2, Subdivision (a).

The facts involved in question 2 (a) have been previously stated, together with the citation of authority thereon.

We conceive that the new Rules of Civil Procedure were intended to substitute a uniform system of procedure in all federal courts in lieu of former diverse procedures and at the same time preserve in substance the old rules of federal equity, in so far as they had proved satisfactory.

In equity cases the Courts of Appeals had exercised jurisdiction to review judgments on the facts, and in the course of time more and more weight was given to findings by the lower court accenting the desirability of findings by the lower court.

This Court on a number of occasions criticized lower courts for not making proper findings, and finally, in the case of Railroad Commission v. Maxcy, 281 U. S. 82, 74 L. Ed. 717, reversed the decision of the lower court and remanded the cause for further proceedings because the lower court had not made any findings of fact. That decision was followed immediately by this Court promulgating former Equity Rule No. 70½ (Robertson & Kirkham, Jurisdiction of the Supreme Court of the United States, Section 180), directing the lower court in all cases in equity to prepare and file separate findings of fact and conclusions of law.

Rule 52 of the new Rules of Civil Procedure is almost identical with old Equity Rule 70½, with the additional provision that a party may apply to the Court for amendment of his findings, and the further provision that the

Circuit Court of Appeals shall not set aside such findings unless clearly erroneous (Appendix, p. 43).

It appears to us that the intendment was to limit the Court of Appeals to a review of the findings of the Judge, and that, absent such findings, it must dismiss the appeal, or, in the alternative, if it appeared that the appellant had not been guilty of any lack of diligence, to reverse and remand the cause for further proceedings or for findings.

This Court has repeatedly followed that procedure. The last case, we believe, is the case of United States v. Pyne, 313 U. S. 127-130, 85 L. Ed. 1231, preceded by the case of Mayo v. Lakeland Highlands Can Co., 309 U. S. 310-316, 84 L. Ed. 774, and Interstate Circuit, Inc., v. U. S. of America, 304 U. S. 55-58, 82 L. Ed. 1146, the same being based upon the Maxcy case, supra, and the case of Fleischmann Construction Co. v. U. S., 270 U. S. 349-355.

The Circuit Court of Appeals for the Eighth Circuit itself, in a series of cases, the last being Storley v. Armour & Co., 107 Fed. (2) 499-513, had adhered to the same rule, and the Sixth Circuit, in a series of cases, the last being Drybrough v. Wear, 111 Fed. (2) 548-550, had likewise construed the Rules of Civil Procedure.

The Rules of Civil Procedure likewise contemplate as a prerequisite to review by the Court of Appeals on the facts some kind of a record of the proceedings had before the District Court. (See Appendix, p. 43 et seq.)

Rule 76 makes provision for an agreed statement of facts, and Rule 75 (b) provides that if the proceedings were stenographically reported that the appellant shall file with his designation two copies of the reporter's transcript of the evidence or proceedings included in his designation. It is true that the rules do not expressly provide how a record of proceedings which were not stenographically re-

ported shall be made up, but it would seem elementary that if the appellant sought to have the judgment reviewed on the facts that the burden would be on him to see that a proper narrative of the facts was prepared, signed and settled by the Judge. If he was unable to secure such a statement from the Court he might be able to have the judgment reversed and remanded with instructions to the Court to complete the record, but it would seem contrary to all previous concepts of judicial procedure that under such circumstances the appellant could ignore the proceedings in the District Court and secure a review of the judgment involved on evidence heard in a prior and superseded proceeding before a referee.

Whatever might be our concept as to orderly procedure, the Court of Appeals proceeded to review the judgment of the District Judge on a record which contained neither findings of fact nor any transcript of the evidence nor agreed statement of the evidence, nor any certificate that the District Judge had tried the cause on the evidence taken before the Referee. The Court of Appeals got around the absence of any record of the proceedings by assuming that the District Judge tried the case on the record made before the Referee. This assumption was not only not based upon anything in the record, but was in conflict with the conceded fact that the services for which the petitioner was claiming compensation were rendered under the appointment of the same District Judge and in proceedings instituted and prosecuted directly before him, and under such circumstances that he could properly take into consideration his personal knowledge as to the amount as well as the value of such services.

Turner Lumber Co. v. Toomer (5th Cir.), 275 Fed. 678;

In re Hamburger (7th Cir.), 103 Fed. (2) 664;

Stanolind Oil & Gas Co. v. Guertzgen (9th Cir.), 100 Fed. (2) 299.

This Court has ruled that it is questionable whether an appellate court may review a discretionary order of a District Court allowing an attorney's fee and definitely ruled that such review cannot be had on an incomplete record.

> Meeker v. Lehigh Valley Rr. Co., 236 U. S. 412-431, 59 L. Ed. 645-658.

The several circuits have likewise ruled that an appellate court may not review the facts on an incomplete record:

> (C. C. A., 2nd Cir.) Grossman v. Kridel, 90 Fed. (2) 624;
> (5th) Ryals v. U. S., 69 Fed. (2) 946.

We submit that the procedure followed by the Court of Appeals in undertaking a review of the judgment on the facts without any record of the proceedings before the District Judge, and without any findings of fact by him, is inconsistent with the usual and accepted course of judicial procedure; is destructive of the very purpose of the Rules of Civil Procedure, and in effect substitutes for an appeal from the District Judge an appeal direct from the Referee. It in effect relieves the appellant of the burden of showing error in the proceedings appealed from and puts upon the appellee the burden of having prepared and settled a record of the proceedings in the District Court, or, in the alternative, of losing all the benefits afforded him by having prevailed in such proceedings.

We respectfully submit that the effect of the decision in the instant case upon the uniformity contemplated by the Bankrupt Act and the Rules of Civil Procedure justifies this Court in assuming jurisdiction to preserve such uniformity, and that in any event the conflict of decision cited between the instant decision of the Court of Appeals and the several other circuits authorizes the intervention of this Court to settle the conflict.

Question 2 (c).

An examination of the opinion of the Court of Appeals discloses that the Court concluded that the petitioner had recovered or contributed to the recovery of only $8,700.00 of the assets concealed by the bankrupt, or, as stated by the Court, that the petitioner was to be credited with creating only that sum, and on that conclusion ruled that the $10,000.00 compensation allowed by the District Judge was excessive. Had that conclusion been true or justified by the record, little complaint could be made to the judgment of the Court of Appeals.

The Court of Appeals arrived at that opinion, however, by stating that there was on hand at the time of the bankruptcy $16,000.00; that nearly $10,000.00 was collected as rentals from the bankrupt's (real) estate, and that the record title to this real estate was in the bankrupt and hence the real estate was not concealed, so that neither the receiver nor the trustee were required to render any special services in collecting these rents (R. 76).

The item of $16,000.00 simply does not appear in the record, and there is nothing in the record from which it might be inferred that the bankrupt was in possession of real estate, or that $10,000.00 or any other amount of rents were collected therefrom.

As was pointed out to the Court of Appeals in the motion for rehearing, statements to that effect were made in a reply brief which was served and filed by the appellant simultaneously with the oral argument (R. 96). We have examined the record carefully, and the only mention of real estate in the record consists of an item of the petitioner's account dated August 2, 1935, which reads as follows:

> "Conferences with creditors and their lawyers filing the certified copies of decrees in Recorder's Office at

St. Louis and St. Louis County for purpose of protecting against transfer of real estate'' (R. 11).

The fact that the bankrupt had any real estate, that it was unconcealed, or that any rents were collected therefrom simply does not appear in the record.

There are many other assumptions which are set out in the summary statement of the case which do not appear in the record, and which affect the propriety of the finding by the Court of Appeals, but we assume that it will be necessary only to show, for the purposes of this petition, that the Court considered facts de hors the record which substantially affected its conclusion, hence we will not take the time to discuss all the assumptions indulged de hors the record which are set out in the summary statement.

It is fundamental that since Courts of Appeal exercise a derivative jurisdiction and are not authorized, in the first instance, to afford a hearing on facts de hors the record, that they must necessarily take the case on the record as made in the lower court. It follows, therefore, that as to facts not heard by a lower court the appellate court could not grant a judicial hearing if it so desired. It is also fundamental and preserved in the Fifth Amendment that a party may not be deprived of a legal right except on a lawful hearing.

It would seem unnecessary to preserve so fundamental a right by rule of court, but the Circuit Court of Appeals for the Eighth Circuit has in fact, by an express rule, declared that it will not consider any statement of fact or evidence not incorporated in the record on appeal (Rules 13-14—Eighth Circuit) (Appendix, pp. 44-45).

This Court, in the case of Rio Grande Irrigation and Col. Co. v. Gildersleeve, 174 U. S. 603-608, 43 L. Ed. 1103-1105, ruled that a court could not dispense with its own rules in

a particular case, and the several Circuit Courts of Appeals have ruled likewise.

The Eighth Circuit itself, in the case of U. S. v. French, 95 Fed. (2) 922-926, has but recently ruled that the rules of court have the effect of law and cannot be nullified by even a custom in procedure. Certiorari was denied in that case (305 U. S. 620).

This Court, in the case of Lonergan v. U. S., 303 U. S. 33, 82 L. Ed. 630, ruled that a wrongful application of a rule of court amounts to the denial of a hearing. The several circuits have likewise ruled that the Court of Appeals may not consider matters not appearing in the record.

(9th) American Trust Co. v. Harris, 88 Fed. (2) 541;
(C. A., D. C.) Cave v. District of Columbia, 90 Fed. (2) 383;
(C. A., D. C.) Pilger v. Sutherland, 57 Fed. (2) 604;
(5th) Ryals v. U. S., 69 Fed. (2) 946.

In the early case of Mitchel et al. v. U. S., 9 Peters 711, 9 L. Ed. 283, is found an illustration of the scrupulous regard which this Court has always given to the provisions of the Fifth Amendment and the necessity of a real hearing on the facts.

In that case it appeared that the District Judge, subsequent to the time when the cause was submitted to him, discovered a water mark on the paper on which a contested deed was written and drew certain conclusions from the water mark. After the appeal had been docketed in the Supreme Court the appellants applied for a commission to procure testimony to explain the water mark and offered to read ex parte depositions to the same purpose. The Court refused the application for a commission.

The Court said, upon a consideration of the case:

"There is, however, one subject which was considered by him (District Judge) into which we do not feel

at liberty to inquire, which is the water mark in the paper on which the Governor's permission of the 7th of January, 1804, was written, noticed and commented on at large by the Judge. Record, 706. This objection was not made in the court below, at the hearing, or in the argument, so that no opportunity was afforded to the petitioner to produce any evidence on the subject, or to his counsel to answer the objection. This court also refused to grant him a commission to take testimony to explain and account for the water mark, or permit him to read the ex parte evidence offered to explain it; because in an appellate court no new evidence could be taken or received without violating the best established rules of evidence and law. Under such circumstances, it would be dealing to the petitioner a measure of justice incompatible with every principle of equity, to visit upon his title an objection which he was not bound to anticipate in the court below, which he could not meet there, and which this court were compelled to refuse him the means of removing by evidence." l. c. 731.

A like situation exists in the present case. The petitioner was not confronted in the court below with the charge that there was $16,000.00 on hand when he undertook his employment, nor was he confronted with the charge that the bankrupt possessed unconcealed real estate from which $10,000.00 in rents had been collected without effort on his part, but the Court of Appeals accepted such purported facts and on the basis thereof visited upon his title to the judgment secured below the effect thereof, though under the record he was not bound to anticipate such facts in the court below and was afforded no opportunity to meet such facts.

In the recent case of Lettulle v. Scofield, 308 U. S. 415, 84 L. Ed. 355, this Court granted a certiorari on the sole ground that it was merely alleged that the Court of Appeals had considered matters not in the record. In the case

of Morgan v. U. S., 304 U. S. 1-23, 82 L. Ed. 1129-1135, the Court reiterated the fundamental doctrine preserved by the Fifth Amendment that no proceeding, judicial or quasi-judicial, could be sustained which involved the condemnation of a party on evidence or facts on which he had not been afforded a hearing. The same rule was announced by this Court in the case of Riverside & Dan River Cotton Mills v. Williamson-Menefee, 237 U. S. 189, 59 L. Ed. 910-912; Maryland Casualty Co. v. Jones, 279 U. S. 792-796, 73 L. Ed. 960.

It is submitted, without regard to the other questions presented, that question 2 (c), presenting, as it does, the propriety of the act of the Court of Appeals in determining the issues in the instant case on facts de hors the record, constitutes such a disregard of the usual and accepted course of judicial procedure and of the provisions of the Fifth Amendment as to call for the exercise of this Court's power of supervision in the premises.

The several other questions presented, it is believed, are supported by the propositions suggested, and their importance in the instant case depend more or less upon the extent of any review which this Court may direct.

It is respectfully submitted that the writ of certiorari should be granted.

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